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IN THE

Supreme Court of the United States

BASSAM YACOUB SALMAN,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR *AMICUS CURIAE* DARYL M. PAYTON IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

STATEMENT OF INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT 1

BACKGROUND 4

I. The Facts of Mr. Payton's Case 4

A. Mr. Payton Was At The End Of A Long Tipping Chain. 4

B. Following The Second Circuit's Decision In *Newman*, The U.S. Attorney's Office Dropped The Case Against Mr. Payton, But The SEC Continued To Pursue Civil Charges. 6

C. The SEC's "Proof" Of Personal Benefit Was That The Tippee Was A Pleasant Roommate. 7

D. The SEC Argued The Jury Could Simply Infer A Personal Benefit Since "You Don't Get Something For Nothing In This World." 11

E. The Jury Was Confused About The Personal Benefit And Scienter Elements, And Inferred Both Without Proof Of Either. 13

ARGUMENT 14

I. **The Existing Law Of Insider Trading Is Untenable, Particularly As Applied To Remote Tippees.** 14

A. **Mr. Payton's Case Demonstrates That The Court Should Adopt The Pecuniary-Gain Standard For The Personal-Benefit Requirement.** 15

B. **Mr. Payton's Case Demonstrates That The Court Should Decline To Extend The Judge-Created Tipping Crime To Remote Tippees.** 18

CONCLUSION 21

TABLE OF AUTHORITIES

CASES

Chiarella v. United States, 445 U.S. 222 (1980).....15, 19

Dirks v. Sec. & Exch. Comm., 463 U.S. 646 (1983).....*passim*

United States v. Newman, 773 F.3d 438 (2d Cir. 2014), *cert. denied*, 136 S. Ct. 242 (2015).....*passim*

United States v. O'Hagan, 521 U.S. 642 (1997).....19

OTHER AUTHORITIES

Br. for Pet., *Salman v. United States*, No. 15-628 (filed May 6, 2016) 12, 16

Amended Complaint, ECF No. 32, *Sec. & Exch. Comm. v. Payton*, No. 14-cv-4644-JSR (S.D.N.Y. filed Mar. 2, 2015). 4, 5

Jury Verdict, ECF No. 136, *Sec. & Exch. Comm. v. Payton*, No. 14-cv-4644-JSR (S.D.N.Y. filed Mar. 3, 2016). 2

Max Stendahl, *SEC Scores Precarious Post-Newman Win in IBM Tip Trial* (Mar. 1, 2016), http://www.law360.com/articles/765523/sec-scores-precarious-post-newman-win-in-ibm-tip-trial.....2, 14, 17

Mitu Gulati et. al., *Fraud by Hindsight*, 98 NW. U. L. REV. 773, 774 (2004) 21

Nolle Prosequi Order, ECF No. 170, *United States v. Conradt et al.*, No. 12-cr-00887-ALC (S.D.N.Y. Feb. 3, 2015). 6

SEC Ex. 611 (Martin Tr.), *Sec. & Exch. Comm. v. Payton*, No. 14-cv-4644-JSR (S.D.N.Y. filed Mar. 1, 2016) ..... *passim*

SEC Ex. 612 (Dallas Tr.), *Sec. & Exch. Comm. v. Payton*, No. 14-cv-4644-JSR (S.D.N.Y. filed Mar. 1, 2016).....11

Supreme Court Rule 37.3 1

Supreme Court Rule 37.6 1

Trial Tr., *Sec. & Exch. Comm. v. Payton*, No. 14-cv-4644-JSR (S.D.N.Y. Feb. 16–29, 2016)... *passim*

STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Pursuant to Supreme Court Rule 37.3, Daryl M. Payton as *amicus curiae* respectfully submits this brief in support of Petitioner Bassam Yacoub Salman.

Mr. Payton, a remote tippee like Mr. Salman who traded on fourth-hand information, was tried and found civilly liable for insider trading in February 2016 before the Honorable Jed S. Rakoff in the Southern District of New York—the same judge who authored the *Salman* opinion below. The facts of Mr. Payton's trial provide a real-world example of how the current insider-trading laws encourage arbitrary and inconsistent enforcement.

SUMMARY OF THE ARGUMENT

As Mr. Payton's case illustrates, the current state of insider-trading law is untenable, particularly as applied to remote tippees like Mr. Salman and Mr. Payton. A key issue in Mr. Payton's trial was whether the tippee had conferred a personal benefit on the tipper, and what, if anything,

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[1] Pursuant to Supreme Court Rule 37.6, counsel for Mr. Payton states that no counsel for a party authored this brief in whole or in part and that no person other than Mr. Payton or his counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent from the parties have been lodged with the Clerk of the Court pursuant to Rule 37.3(a).

Mr. Payton knew or should have known about it. Even in light of the Second Circuit's decision in *United States v. Newman*,[2] the law on personal benefit is sufficiently ill-defined that it failed to provide any meaningful guidance on what the United States Securities & Exchange Commission ("SEC") was required to prove. Lacking any concrete evidence of a personal benefit between the tipper and tippee, the SEC told the jury that it could simply *infer* a benefit and knowledge thereof based on the tippee's and tipper's roommate relationship and because "[y]ou don't get something for nothing in this world."[3] The jury did just that.[4]

Mr. Payton joins Mr. Salman in urging this Court to define the personal-benefit requirement as a pecuniary gain that cannot be merely inferred from certain relationships. As the decision below and the application of *Newman* in Mr. Payton's case both

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[2] 773 F.3d 438 (2d Cir. 2014), *cert. denied*, 136 S. Ct. 242 (2015).

[3] Trial Tr. 912:3–14, *Sec. & Exch. Comm. v. Payton*, No. 14-cv-4644-JSR (S.D.N.Y. Feb. 16–29, 2016) (hereinafter "Trial Tr.") (transcript may be viewed at the trial court's public terminal or through the court reporter until July 8, 2016, when it will be made available through PACER).

[4] Jury Verdict, ECF No. 136, *Sec. & Exch. Comm. v. Payton*, No. 14-cv-4644-JSR (S.D.N.Y. Mar. 3, 2016); Max Stendahl, *SEC Scores Precarious Post-Newman Win in IBM Tip Trial*, Law360 (Mar. 1, 2016), http://www.law360.com/articles/765523/sec-scores-precarious-post-newman-win-in-ibm-tip-trial.

show, the government and some courts have interpreted this Court's pronouncement in *Dirks v. Securities & Exchange Commission* that a personal benefit could include "the benefit one would obtain from simply making a gift of confidential information to a trading relative or friend"[5] to mean that the government need only prove that the tippee and tipper are friends or relatives. In Mr. Payton's case, this allowed the government to prevail in circumstances where there was no proof of a personal benefit exchanged between the tippee and tipper, who were casual friends and roommates, and no proof that Mr. Payton had any knowledge, or reason to know, of the circumstances between the tippee and tipper. This approach, which provides no meaningful restrictions on the government's ability to prosecute remote tippees, allows for arbitrary and inconsistent enforcement.

Even if the Court declines to adopt the pecuniary-gain standard for the personal-benefit requirement, the judge-created tipping crime should not be extended to remote tippees who do not participate in or have knowledge of the original breach and tip. Material nonpublic information can come from a variety of sources, many of which are not improper. Since there is no blanket prohibition against trading on material nonpublic information or any statute defining the boundaries of insider trading, allowing the government to prosecute someone at the far end of a tipping chain like Mr.

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[5] 463 U.S. 646, 664 (1983).

Payton or Mr. Salman, neither of whom participated in or knew any details about the tipper's interactions with the original tippee, raises serious due process concerns.

BACKGROUND

I. The Facts of Mr. Payton's Case

A. Mr. Payton Was At The End Of A Long Tipping Chain.

In May 2009, Michael Dallas, a corporate associate at Cravath, Swaine & Moore LLP, divulged to his friend Trent Martin that Cravath's client IBM was acquiring a company called SPSS.[6] This information was material and nonpublic.[7] Mr. Martin traded on it and shared the information with Thomas Conradt, from whom Mr. Martin was subletting a room that he found advertised on Craiglist.[8] Mr. Conradt, a broker at the financial firm Euro Pacific Capital, then told several coworkers, including Daryl Payton, that SPSS was ripe for a buyout.[9] Mr. Payton at first did nothing

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[6] Amended Complaint at ¶ 48, ECF No. 32, *Sec. & Exch. Comm. v. Payton*, No. 14-cv-4644-JSR (S.D.N.Y. filed Mar. 2, 2015).

[7] *Id.* at ¶ 25.

[8] *Id.* at ¶¶ 54, 61; Trial Tr. 169:20–171:8, 174:17–25, 178:12–14, 179:2–10, 222:4–19, 224:7–225:6, 235:16–236:18, 295:9–11, 284:1–4, 305:18–306:1.

[9] Trial Tr. 242:15–243:5, 451:1–5.

with the information. A month and a half later, on the advice of his best friend and coworker Benjamin Durant, who had determined that SPSS was a promising buyout target, Payton traded in SPSS stock options with various expiration dates.[10] The deal was announced soon thereafter, and Payton made approximately $250,000.[11]

Several Euro Pacific employees had traded in SPSS options shortly before the announcement, triggering a government investigation and, eventually, insider trading indictments. Although Mr. Dallas, the Cravath associate, had a fiduciary duty inherent in the attorney-client relationship not to disclose material nonpublic information about his client's impending acquisition of SPSS, the government chose not to charge him. Instead, the government charged his friend *Mr. Martin* as the original source of the tip on the theory that he had breached a nebulous duty of confidentiality that he owed Mr. Dallas[12]—presumably in order to support a theory of liability with respect to the remote tippees who made money on the information. Mr. Payton was charged criminally and civilly for insider

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[10] Trial Tr. 458:20–23, 459:15–16, 500:15–501:5, 502:20–503:24, 556:20–23, 559:14–21, 569:24–570:11, 735:6–10, 744:1–16.

[11] Trial Tr. 279:14–16, 513:11–21, 576:14–577:7.

[12] Amended Complaint at ¶¶ 46–55, ECF No. 32, *Sec. & Exch. Comm. v. Payton*, No. 14-cv-4644-JSR (S.D.N.Y. filed Mar. 2, 2015).

trading. Mssrs. Martin and Conradt settled with the SEC and became cooperators as part of their settlement terms. Mr. Conradt later tried, unsuccessfully, to get out from under his settlement agreement.

B. Following The Second Circuit's Decision In *Newman*, The U.S. Attorney's Office Dropped The Case Against Mr. Payton, But The SEC Continued To Pursue Civil Charges.

Following the Second Circuit's decision in *United States v. Newman*,[13] which held that to establish insider trading, the government must prove that remote tippees like Mr. Payton knew that the tipper received a personal benefit in exchange for the tip, the U.S. Attorney's Office for the Southern District of New York dropped its prosecution of Mr. Payton and the other brokers who had traded.[14] The SEC, however, continued to pursue civil insider trading charges against Mr. Payton. The case went to trial against Mssrs. Payton and Durant in February 2016.

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[13] 773 F.3d 438.

[14] *See Nolle Prosequi* Order, ECF No. 170, *United States v. Conradt et al.*, No. 12-cr-00887-ALC (S.D.N.Y. filed Feb. 3, 2015).

C. The SEC's "Proof" Of Personal Benefit Was That The Tippee Was A Pleasant Roommate.

The SEC's evidence purportedly showing that Mr. Martin tipped Mr. Conradt in exchange for a personal benefit was somewhere between razor-thin and nonexistent, and unsupported by its own cooperators' testimony. The SEC presented evidence showing that around the time Mr. Martin tipped Mr. Conradt, Mr. Conradt "conferred" the following "benefits" on Mr. Martin:

- Menial apartment chores that he did for himself, including asking the landlord to fix the buzzer and repair a leaky ceiling outside Mr. Conradt's bedroom, hiring a cleaning lady that all of the roommates paid for, and calling 311 to have a smelly truck removed from the street outside Mr. Conradt's bedroom window;[15]

- Negotiating a rent reduction, during which Mr. Martin found out that Mr. Conradt and their third roommate had been fleecing Mr. Martin for over half of the rent, and, after which, Mr. Martin continued to pay a disproportionately high share[16]; and

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[15] Trial Tr. 118:4–127:20, 300:7–25.

[16] Trial Tr. 141:3–142:22, 294:18–299:21.

- Forwarding to Mr. Martin a google search of defense attorneys—none of whom Mr. Martin hired—when Mr. Martin was arrested for a drunken stunt.[17]

Both Mr. Martin and Mr. Conradt testified that these were wholly unrelated to the tip,[18] and were not even benefits to Mr. Martin.[19] Mr. Martin

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[17] Trial Tr. 154:21–155:13, 303:8–304:4–6.

[18] Trial Tr. 285:19–287:20, 293:6–294:1, 963:15–23, 964:12–17; SEC Ex. 611 (Martin Tr.) at 22:15–21, *Sec. & Exch. Comm. v. Payton*, No. 14-cv-4644-JSR (S.D.N.Y. filed Mar. 1, 2016) (hereinafter "Martin Tr."), ("Q: Okay. Did you receive anything from Mr. Conradt in exchange for telling him about SPSS? A: No I didn't. Q: Did you provide him with the information about SPSS because of any personal benefits that he had conferred to you in the past? A: No, I didn't."); 23:2–14 ("Q: Did your decision to share the information with Mr. Conradt have anything to do with Mr. Conradt's role in obtaining a rent reduction in the apartment? A: No, it didn't. Q: Did it have anything to do with his arranging repairs in the apartment? A: No, it didn't . Q: Did it have anything to do with his arranging to have the buzzer in the apartment fixed? A: No, it didn't."); 39:20–40:16 ("I didn't provide the tip in exchange for help with the legal case."). Because Mssrs. Martin and Dallas testified via video deposition, their testimony was entered on the record as exhibits.

[19] Trial Tr. 105:20–24, 117:12–118:1, 301:5–9, 304:4–9; Martin Tr. at 38:7–9 ("Q: Did you consider Mr. Conradt's assistance to be of any value? A: No, not really."); 170:24–171:7 ("Q: Do you know what [Mr. Conradt is] talking about when he writes 'the buzzers and the roof'? A: I don't know. Maybe the buzzer was broken from the door to our

testified that he actually told Mr. Conradt about SPSS because he wanted to talk to someone about the appropriateness of his trades and Mr. Conradt happened to be around and had gone to law school,[20] and that he did not provide the SPSS information in exchange for any benefit that he had received or expected to receive from Mr. Conradt.[21] Likewise,

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apartment and the roof might have been leaking, maybe. I'm only guessing.").

[20] Martin Tr. at 17:11–18:11 ("Q: Okay. And why did you speak to Mr. Conradt? A: At the time I was concerned around the – whether or not it was legal to trade in the SPSS, after what Mike Dallas had told me. Tom Conradt was a lawyer who worked in the securities industry. He was also, you know, someone who was there in the apartment at the time and, you know, I was trying to ascertain, you know, what the implications were from trading the stock and, you know, whether it was illegal .").

[21] *Id.* at 22:15–23:14 ("Q: Okay. Did you receive anything from Mr. Conradt in exchange for telling him about SPSS? A: No, I didn't. Q: Did you provide him with the information about SPSS because of any personal benefits that he had conferred to you in the past? A: No, I didn't. Q: Did you expect to receive anything from him in the future as a result of sharing the information with him? A: No, I didn't. Q: Did your decision to share the information with Mr. Conradt have anything to do with Mr. Conradt's role in obtaining a rent reduction in the apartment? A: No, it didn't. Q: Did it have anything to do with his arranging for repairs in the apartment? A: No, it didn't. Q: Did it have anything to do with his arranging to have the cable bill reduced? A: No, it didn't. Q: Did it have anything to do with his arranging to have the buzzer in the apartment fixed? A: No, it didn't.").

Mr. Conradt testified that he never gave Mr. Martin anything in exchange for the SPSS information and that Mr. Martin never expressed that he expected a benefit in return for the information.[22]

Nor was there evidence suggesting that Mr. Martin and Mr. Conradt had a close personal relationship which might somehow substitute for evidence of a pecuniary exchange. Both Mr. Martin and Mr. Conradt testified that they were not close friends.[23] Mr. Martin and Mr. Conradt only first met in the fall of 2008 when Mr. Martin responded to a Craigslist advertisement for the apartment Mr. Conradt shared with another roommate, and they hung out in the apartment on occasion.[24] Mr. Martin

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[22] Trial Tr. 285:19–286:11.

[23] Trial Tr. 99:9–19; Martin Tr. at 14:4–13 ("Q: Did you consider Mr. Conradt to be a close friend? A. No, I didn't. Q: Did you consider him to be a friend at all? A: I would say he was a friend, yes, so we often hung out in the apartment together and— Q: Yes, go ahead. A: Yes, but, as I said before, he – you know, it was really just sort of like a roommate friend, not like a close friend I'd go and hang out with.").

[24] Martin Tr. at 10:9–16 ("Q: Okay. When did you first meet Mr. Conradt? A: I met him around October 2008. Q: Did you know him before you moved into this apartment with him? A: No, I didn't. Q: So what were the circumstances that led you to move into the apartment? A: I saw the apartment listed on Craigslist."); Trial Tr. 91:12–13.

did not invite Mr. Conradt to his 30th birthday party.[25]

The SEC presented no evidence that Payton knew anything about either Mr. Martin's purported breach of Mr. Dallas's trust or Mr. Conradt's purported personal benefit to Mr. Martin. The undisputed facts were that Mr. Payton had never heard of the Cravath associate Mr. Dallas, and had only briefly met Mr. Martin once in passing and knew virtually nothing about him.[26]

D. The SEC Argued The Jury Could Simply Infer A Personal Benefit Since "You Don't Get Something For Nothing In This World."

During summations, the SEC implied that the jury need not identify a specific personal benefit at all. Instead, the SEC urged the panel to infer that because Mr. Martin would not have wanted to give something for nothing, he must have received a personal benefit:

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[25] SEC Ex. 612 (Dallas Tr.) at 121:14–122:8, *Sec. & Exch. Comm. v. Payton*, No. 14-cv-4644-JSR (S.D.N.Y. filed Mar. 1, 2016), ("Q: You talked a little bit earlier or you testified a bit earlier about Trent Martin's 30th birthday party; do you recall that? Q: Do you remember Tom Conradt being there? A: I don't recall meeting Tom or Tom being there, no."); Trial Tr. 307:12–308:2.

[26] Trial Tr. 580:14–25; 447:21–448:4.

> When you think of all the evidence you saw relating to benefits, think about what you know about your own lives. You don't get something for nothing in this world. . . . So use your common sense. Why would anyone pass on information like this without receiving a benefit? I suggest to you that they wouldn't.[27]

The SEC also argued that the jury could simply infer the scienter element—that Payton knew or should have known[28] Mr. Martin tipped Mr. Conradt in breach of a duty and in exchange for a personal benefit—without pointing to any specific evidence supporting it. The SEC argued that because Payton was an experienced trader, he "had reason to know that the information was coming in breach of a duty because [he] knew that this was the type of information that doesn't just get out to the market,"[29] and, by the same logic, he "had reason to know that Martin was breaching a duty passing to Thomas Conradt."[30]

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27 Trial Tr. at 912:3–14.

28 This scienter standard only applies in civil cases; in criminal cases, the standard is actual knowledge. *See* Br. for Pet. at 49, *Salman v. United States*, No. 15-628 (filed May 6, 2016) (describing willfulness requirement); *id.* at 58 (discussing actual knowledge of benefit requirement under *Dirks*, *Newman*, and general principles of criminal law).

29 Trial Tr. at 914:23–915:20.

30 *Id.* at 915:23–916:6.

The jury delivered a verdict finding Mr. Payton liable for insider trading. It is clear from the jury's notes and the comments of individual jurors to the press after the verdict that the jury was confused about the personal benefit and scienter requirements.

E. The Jury Was Confused About The Personal Benefit And Scienter Elements, And Inferred Both Without Proof Of Either.

During deliberations, the jury sent a note asking the court to clarify the scienter requirement. The jury asked the court to elaborate on the instruction that the scienter element "can be satisfied if you find that the defendant you are considering was aware of a high probability that someone had improperly disclosed the inside information to Mr. Conradt for personal benefit" "as it relates to high probability and personal benefit of the person providing the information."[31]

Immediately after the jury rendered its verdict, several jurors told reporters that the jury panel was "confused by the issue" and had failed to identify *any* specific personal benefit in reaching its verdict.[32] They reported that the jury thought the

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31 Trial Tr. 1098:18–25; 1101:2–3 (emphasis in jury note).

32 Stendahl, *supra* note 4.

SEC's proof of personal benefit—that Mr. Conradt provided a personal benefit through his role as a helpful roommate and also through his assistance following Mr. Martin's arrest—was "nonsense."[33] The jury determined, however, that it was enough that "the participants in the alleged scheme had acted out of a general desire to make money"[34] and that the defendants were "sophisticated traders who should have known that a benefit was likely exchanged."[35] The jurors had inferred the requisite scienter, just as the SEC had encouraged them to in its summation.[36] As one juror put it, "[w]e just assumed that you can't just believe someone would give this kind of information without expecting a benefit."[37]

ARGUMENT

I. The Existing Law Of Insider Trading Is Untenable, Particularly As Applied To Remote Tippees.

Although this Court has repeatedly held that trading on material nonpublic information is not

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33 *Id.*

34 *Id.*

35 *Id.*

36 Trial Tr. 912:5.

37 Stendahl, *supra* note 4.

illegal,[38] the judge-created law of insider trading provides no meaningful guidance between legal and illegal conduct and, as happened in Mr. Payton's case, is subject to arbitrary enforcement by regulators. As this Court has observed, "[w]ithout legal limitations, market participants are forced to rely on the reasonableness of the SEC's litigation strategy, but that can be hazardous[.]"[39] Such concerns are exponentially magnified when applied to remote tippees. Mr. Payton's case illustrates the hazard of relying "on the reasonableness of the SEC's litigation strategy,"[40] and demonstrates how the current legal framework encourages inconsistent enforcement.

A. Mr. Payton's Case Demonstrates That The Court Should Adopt The Pecuniary-Gain Standard For The Personal-Benefit Requirement.

The Court should, as Mr. Salman argues, reject the Ninth Circuit's holding that evidence of a certain relationship between the tipper and tippee

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38 *Chiarella v. United States*, 445 U.S. 222, 229 (1980) ("a purchaser of stock who has no duty to a prospective seller because he is neither an insider nor a fiduciary has been held to have no obligation to reveal material facts"); *Dirks v. Sec. & Exch. Comm.*, 463 U.S. 646, 657 (1983) ("only some persons, under some circumstances, will be barred from trading while in possession of material nonpublic information").

39 *Dirks*, 463 U.S. at 664 n.24.

40 *Id.*

suffices to demonstrate that the tipper received a benefit and instead hold that, consistent with *Newman*, the government must prove a pecuniary gain to establish insider trading.[41] Mr. Payton's case, however, illustrates that even under *Newman*, there is the danger that, unless this Court makes clear that a personal benefit may not be simply inferred from a personal relationship between the tipper and tippee, courts may permit the government to satisfy its burden by proving only minimal ties between the tipper and tippee in misplaced reliance on *Dirks'* language that a "personal benefit"[42] could include "a gift of confidential information to a trading relative or friend."[43] This interpretation of *Dirks* renders the Court's restrictions on insider trading liability meaningless and should be clarified.

During Mr. Payton's trial, the SEC presented a number of "benefits" that Mr. Conradt purportedly conferred on Mr. Martin in exchange for the tip—menial chores, negotiating a rent reduction for himself (after which Mr. Martin continued to pay a disproportionately high share of the rent), and forwarding a google search of defense attorneys. These all fall far short of the objective personal benefits required under this Court's decision in

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41 *See* Br. for Pet. at 28–30, *Salman v. United States*, No. 15-628 (filed May 6, 2016).

42 *Dirks*, 463 U.S. at 664.

43 *Id.*

Dirks.[44] Sensing that the jury would, as it did, conclude that these personal-benefit arguments were "nonsense,"[45] the SEC changed tack and argued that a personal benefit could be simply *inferred* from Mr. Martin's and Mr. Conradt's relationship and the "common-sense" notion that one does not disclose information without getting something of value in return.[46] As several jurors reported to the press immediately after they rendered a verdict against Mr. Payton, this argument carried the day.[47]

Permitting insider trading liability on this basis all but eviscerates the requirement that the inside information be exchanged for a personal benefit. This is because in nearly every insider trading case, the tipper and tippee will have some sort of preexisting relationship sufficient to infer that the tip was a gift since, as the SEC put it, "[y]ou don't get something for nothing in this world."[48] Its effects are compounded when applied to remote tippees, who (like Mr. Payton) could be found to have the requisite scienter simply because the

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[44] 463 U.S. at 663 (to establish insider trading, government must show "a pecuniary gain or a reputational benefit that will translate into future earnings").

[45] Stendahl, *supra* note 4.

[46] Trial Tr. 912:3–14.

[47] Stendahl, *supra* note 4.

[48] Trial Tr. 912:3–14

government argues that the tippee deduced the exchange of a personal benefit based on the nature of the information.[49]

B. Mr. Payton's Case Demonstrates That The Court Should Decline To Extend The Judge-Created Tipping Crime To Remote Tippees.

Mr. Payton's case also illustrates why, even if the Court declines to adopt the pecuniary-gain standard for the personal-benefit requirement, the judge-created tipping crime should not be extended to remote tippees who do not participate in or have knowledge of the original breach and tip. The Court has never held that the crime of insider trading covers remote tippees, and nor should it.

First, the misappropriation theory of insider trading can become completely divorced from reality as the government charges tippees further down the chain. Remote tippee liability in misappropriation cases like Mr. Payton's and Mr. Salman's is based on the theory that the remote tippee stands in the shoes of the original tipper, who defrauded someone by misappropriating his or her information in breach of a fiduciary duty.[50] In Mr. Payton's case, the SEC

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[49] *Id.* at 915:23–916:6.

[50] *See United States v. O'Hagan*, 521 U.S. 642, 652 (1997) ("In lieu of premising liability on a fiduciary relationship between company insider and purchaser or seller of the company's stock, the misappropriation theory premises liability on a fiduciary-turned-trader's *deception of those*

charged him under the completely fictitious theory that *Mr. Martin* was the original tipper who violated a duty of trust and confidence to his friend *Mr. Dallas*—the Cravath associate who disclosed all of the details of the SPSS acquisition in the course of boasting to his friend about his work. Thus, under the SEC's theory of the case, Mr. Payton's "crime" was that he *defrauded Mr. Dallas* by trading on the SPSS information.

In reality, of course, no one defrauded Mr. Dallas. Far from being a victim, Mr. Dallas was the true tipper who violated a fiduciary duty to his firm's client by sharing information with his close friend Mr. Martin about the pending SPSS acquisition. But the government did not charge the case that way, presumably because doing so would have made it more difficult to prove the elements of insider trading against remote tippees like Mr. Payton who had never even heard of Cravath, Mr. Dallas, or Mr. Dallas's friendship with Mr. Martin. Extending insider trading liability to remote tippees not only allows, but actually encourages, the government to concoct charging theories that do not comport with reality.

Second, inasmuch as there is no blanket prohibition against trading on material nonpublic

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who entrusted him with access to confidential information.") (emphasis added); *Newman*, 773 F.3d at 447 ("the tippee's liability derives *only* from the tipper's breach of a fiduciary duty, *not* from trading on material, nonpublic information") (citing *Chiarella*, 445 U.S. at 233).

information or statute defining the boundaries of insider trading, prosecuting someone in Mr. Payton's position raises meaningful due process concerns. Material nonpublic information can come from a variety of sources, many of which are not improper. For example, it is legal to trade on material nonpublic information found in a briefcase mistakenly left on the subway or overheard at a restaurant. Remote tippees like Salman, Newman, and Payton are often traders at the end of an attenuated tipping chain who learn of potentially market-moving information second-, third-, or in Mr. Payton's case, fourth-hand, and have no ability to discern between material nonpublic information and a rumor.[51] Rarely do remote tippees directly participate in any fraud or betrayal of the owner of the confidential information, since they are typically far removed from that transaction.[52]

Remote tippee cases are also more susceptible to hindsight bias, which distorts the judgment of prosecutors, regulators, and juries when evaluating how such information made its way to the remote tippee, particularly when those individuals have made substantial trading profits on what turned out to be reliable material nonpublic information.[53]

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[51] *See, e.g.*, Trial Tr. 459:11–23, 495:15–23, 499:21–500:8 (describing SPSS information as a "rumor").

[52] *Newman*, 773 F.3d at 448 (collecting cases).

[53] *See* Mitu Gulati et al., *Fraud by Hindsight*, 98 NW. U. L. REV. 773, 774 (2004) ("Hindsight blurs the distinction between fraud and mistake. People consistently overstate

Casual conversations regarding market speculation or momentum take on heightened importance in hindsight; mere rumors become solid, "good-as-gold"[54] information once proven to be true.

By declining to extend the judge-created tipping crime to remote tippees who do not participate in the original breach and tip, the Court will prevent arbitrary and inconsistent enforcement in circumstances where the line between legality and illegality is ill-defined and not delineated by statute.

CONCLUSION

It is a due-process imperative that the Court clearly delineate legal and illegal trading and establish a "guiding principle" dictating market participants' conduct.[55] For the reasons stated above, Mr. Payton as *amicus curiae* respectfully urges the court to reverse the judgment of the Ninth Circuit Court of Appeals and to define the personal-benefit requirement as a pecuniary gain that cannot

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what could have been predicted after events have unfolded—a phenomenon psychologists call the hindsight bias. People believe they could have predicted events better than was actually the case and believe that others should have been able to predict them. Consequently, they blame others for failing to have foreseen events that reasonable people in foresight could not have foreseen.") (internal citations omitted).

[54] Trial Tr. 33:23–34:9.

[55] *Dirks*, 463 U.S. at 664.

be merely inferred from certain relationships, or hold that the judge-created tipping crime should not be extended to remote tippees who do not participate in the original breach and tip.

Respectfully submitted,

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